The Supreme Court
OF THE
United States

October Term, A. D. 1943

No. 743

M. P. Depaoli and Lena Depaoli, his wife,
Petitioners,

vs.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit

and

BRIEF IN SUPPORT THEREOF

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To The Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED

This action was filed in the District Court of the United States for the District of Nevada on the 4th day of February, 1938, for the recovery of the possession of certain real property situated, located and being

in Washoe County, Nevada, said real property being more particularly described as follows, to-wit:

> Township 21 north, range 24 east, M. D. M. Nevada, Section 22, Lots 7 and 8; Section 27, Lots 1, 2, 3, 6, 7, 10, 11, 12, 13 and 14 containing 415.35 acres (R. 2).

For approximately seventy-seven years prior to the institution of this action and since the year 1861, the above-described real property has been in the exclusive and undivided possession of petitioners and their grantors and predecessors in interest (R. 232); that during said period of time and since the year 1861, petitioners, their grantors and immediate predecessors in interest in the occupation of said real property have tilled, cultivated and irrigated the same and have broken and cleared the same from uncultivated, raw land; that during said period of time said petitioners, their grantors and predecessors in interest have improved the same for farming purposes and have constructed buildings, fences, ditches and dams thereon and used in connection therewith; that crops have been produced thereon by said petitioners, their grantors and predecessors in interest each and every year since the year 1864 (R. 232); that in connection therewith said petitioners, their grantors and predecessors in interest have been granted by judicial determination various water rights predicated upon the real property in question, which said water rights have been recognized by the United States District Court for the District of Nevada in an action wherein respondent herein was a party litigant (R. 241); that said real property forming the subject matter of this action is adjacent to patented land owned

by petitioners in fee simple, which said patented land, together with the land forming the subject matter of this action has been operated for many years last past as a single ranching unit (R. 237).

That at the time said real property forming the subject matter of this action was settled upon and in the year 1861 the public surveys had not been extended to include said lands and the same were open and unsurveyed (R. 232); that subsequent to the settlement of the real property in question and on March 23, 1874, by executive order there was established what is known as the Pyramid Lake Indian Reservation (R. 236); that prior to the establishment of said Pyramid Lake Indian Reservation and in the year 1865 the exterior boundaries thereof were established by survey, which survey included the real property herein referred to; that thereafter and on May 13, 1865, the Department of the Interior directed that the southerly boundary of said reservation as so surveyed be moved to a point ten miles north of that fixed by said survey so as to exclude the real property herein referred to (R. 236); subsequently and on August 17, 1865, said order was revoked; that notwithstanding the fact that the real property in question is included within the exterior boundaries of said Pyramid Lake Indian Reservation, the same has never been occupied, used or improved by the Piute Indians, for whom said reservation was created, which said Indians have never been in possession of the same (R. 237); that said real property is about twenty miles distant from the nearest portion of said reservation occupied by said Indians (R. 238).

That no effort was made to remove petitioners or their predecessors in interest from said real property prior to the year 1909; that in the year 1916 actions for ejectment were instituted in the District Court of the United States for the District of Nevada against petitioners herein, which said actions were postponed at the request of the Department of the Interior; that thereafter and on June 7, 1924, the Congress of the United States passed an act entitled "An Act for the Relief of Settlers and Townsite Occupants of Certain Lands in the Pyramid Lake Indian Reservation, Nevada," being Chapter 311, Public Laws of the United States (43 Stats. 596, Chapter 311); that a copy of said act is appended hereto and forms Appendix A attached to petitioners' brief in support of this petition; that said act was designed not only for the relief of petitioners herein, but also for the relief of various other white settlers similarly situated (R. 237).

That said act of June 7, 1924, provided, among other things, as follows: It authorized the Secretary of the Interior "to sell to settlers or their transferees ***. All sales *** shall be made through the local Land Office within ninety days after the price of the land shall have been fixed ***. Provided further, that said sales shall be by private cash entry ***. Provided that where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation" (R. 226).

That thereafter and in March of 1925 the Secretary of the Interior promulgated certain regulations regard-

ing the "terms, conditions, and price per acre" and the time of payment therefor. Said regulations were modified from time to time over a period of years, which said modifications variously reduced the price per acre and changed the time and manner of payment (R. 226).

That on March 3, 1925, M. P. Depaoli, one of the petitioners herein, as a qualified applicant under said act and pursuant to said act made application to the Department of the Interior to purchase the real property herein referred to; that in June of 1925 said applicant made a quarter-payment of $2,514.82 on the total appraised price of the real property covered by said application in the total sum of $6,068.03; that on September 16, 1925, the General Land Office allowed said application and retained said initial quarter-payment (R. 239); that thereafter, by reason of economic conditions and the pendency of proposed legislation to reduce the purchase price of the real property in question, no additional payments were made by said applicant and the General Land Office allowed the matter to remain in status quo; that various arrangements for payment and notices to pay were respectively made and given over a period of years until March 10, 1936, at which time the General Land Office notified said applicant that the Secretary of the Interior had ruled that all interest due on the unpaid principal was required to be paid within thirty days and that one-third of the remaining principal was required to be paid within six months and that failing this the application would be cancelled without further notice (R. 240).

That said applicant failed to pay the interest as re-

quired and on May 13, 1936, the Secretary of the Interior ordered the cancellation of the application; that thereafter and on August 11, 1936, said applicant, M. P. Depaoli, paid the full balance of the purchase price and interest to the Register of the United States Land Office at Carson City, Nevada, which said final payment and interest totaling $5,116.62 was duly and regularly forwarded to the United States Land Office at Washington, D. C., and duly and regularly deposited with the Treasurer of the United States; that said final payment was received and accepted by the Register and Receiver of the Carson City Land Office in Carson City, Nevada, and by the General Land Office at Washington, D. C., and reported and deposited with the United States Treasury by the Department of the Interior; that said money was retained by respondent herein for two years and eight months without question; that more than one year and two months after the filing of this action, to-wit, on April 17, 1939, the return of said final payment was tendered to said M. P. Depaoli, which tender was refused and said payment returned to the Federal Reserve Bank at San Francisco, California, from whence the same had been sent (R. 227, 243); that no tender or offer to return the initial payment of $2,514.82 has ever been made by respondent to petitioners; that said respondent still has in its possession the full purchase price of said real property, together with interest thereon totaling the sum of $7,631.44 (R. 243).

Upon the basis of the foregoing facts, the District Court of the United States for the District of Nevada,

in which court the above-entitled matter was tried, determined that an entry was made upon the real property in question by M. P. Depaoli, one of the petitioners herein, and that as a result of said entry a contract arose as between said M. P. Depaoli and respondent herein, which said contract created the relationship of vendor and vendee as between the parties thereto. The said trial court further determined that said contract was not subject to forfeiture under the circumstances herein presented and that the same could only be terminated pursuant to general equitable principles governing suits for cancellation of a conveyance or the rescission of a contract (R. 246).

Upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, said Court reversed the judgment of the District Court of the United States for the District of Nevada and determined the foregoing legal principles adversely to petitioners herein upon the basis of the decision in the case of *United States of America vs. Garaventa Land and Livestock Co.* (Appendix B) in which said last-named case Circuit Judge Healy dissented.

BASIS OF JURISDICTION OF UNITED STATES SUPREME COURT

The jurisdiction of the United States Supreme Court is invoked under Section 240A of the Judicial Code as amended, 28 U. S. C. A. 347, and under the act of June 7, 1924, Chapter 311, 43 Stat. 596, 25 U. S. C. A., Section 421 (note).

The judgment sought to be reviewed was entered

by the United States Circuit Court of Appeals for the Ninth Circuit on the 9th day of December, 1943. Said judgment of said Circuit Court of Appeals is to be found in 139 Fed. (2nd) 225. Said judgment of said Circuit Court of Appeals reversed a judgment of the United States District Court for the District of Nevada entered by said District Court on the 11th day of February, 1943, which said last-named judgment of said District Court is to be found in 47 Fed. Supp. 688 (R. 247).

QUESTIONS PRESENTED

The following questions are presented for consideration upon this petition for writ of certiorari:

First: Whether or not an "entry" upon the real property in question was made by M. P. Depaoli, one of the petitioners herein, under the terms and provisions of the act of June 7, 1924, herein referred to, by the application to purchase made by him, the payment by him of the initial installment upon the purchase price and the allowance of said application by the General Land Office.

Second: Whether or not the "entry" made by said M. P. Depaoli, one of the petitioners herein, in the manner hereinabove set forth in the Summary Statement of Matter Involved created a property right.

Third: Whether or not the property right created by the "entry" under consideration is such a property right as to be entitled to the protection of the provisions of the Fifth Amendment to the Constitution of the United States of America.

Fourth: Whether or not a contract creating a vendor and vendee relationship between respondent and M. P. Depaoli, one of the petitioners herein, arose as a result of the making of the "entry" herein referred to.

Fifth: Whether or not respondent herein in seeking to cancel petitioner's contract of purchase is not bound by general principles of equity ordinarily governing the cancellation of a conveyance or rescission of a contract.

Sixth: Whether or not under the Act of June 7, 1924, Chapter 311, 43 Stat. 596, 225 U. S. C. A., Section 421 (note), the Secretary of the Interior has the authority to arbitrarily declare a forfeiture of petitioners' rights in the real property in question after having originally promulgated rules and regulations under said act, none of which contain provision for forfeiture.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The decision of the Circuit Court of Appeals sought to be reviewed hereby is erroneous and in conflict with the principles of applicable decisions of this Court.

To the extent that said decision determines that petitioners have acquired no equitable interest or property rights in the real property in question, said decision is in conflict with the decisions of this Court in the following cases, among others: *Chotard vs. Pope*, 12 Wheat. (U. S.) 586; *McMichael vs. Murphy*, 197 U. S. 304; *Starr vs. Beck*, 133 U. S. 541; *Whitney vs. Taylor*, 158 U. S. 85; *Witherspoon vs. Duncan*, 71 U. S. 210 (4 Wall. 210); *The Hastings & Dakota Railroad Company vs. Whitney*, 132 U. S. 357; and is in conflict with the deci-

sions of other Circuit Courts of Appeals on the same matter in the following cases, among others: *Denny vs. Dodson*, 32 Fed. 899; *U. S. vs. Northern Pac. Ry. Co.*, 204 Fed. 485; and *McCune vs. Essig*, 118 Fed. 273.

To the extent that said decision determines that no contract exists as between the parties hereto, the cancellation of which is subject to general principles of equity governing the cancellation of conveyances or the rescission of contracts, said decision is in conflict with the decisions of this Court in the following cases, among others: *Pan American Petroleum Company vs. United States*, 273 U. S. 456, 506; *U. S. vs. Detroit Lumber Company*, 200 U. S. 321, 339; *United States vs. Stinson*, 197 U. S. 200, 204; and *Reading Steel Casting Company vs. United States*, 268 U. S. 186.

In this connection it will be noted that Circuit Judge Healy in his dissenting opinion in the case of *United States vs. Garaventa Land and Livestock Company*, 129 Fed. 2d 416, upon which the decision of the Circuit Court of Appeals in this case is predicated, states as follows:

> "Equitable principles will not, of course, be applied to frustrate the purpose of a law of the United States or to circumvent public policy. Pan American Company v. United States, 273 U. S. 456, 506; Causey v. United States, 240 U. S. 399, 402; Heckman v. United States, 224 U. S. 413, 446; United States v. Trinidad Coal Company, 137 U. S. 160, 170. But it is well settled that general principles of equity will ordinarily govern in suits by the United States to secure the cancellation of a conveyance or the rescission of a contract. Pan American Company v. United States, supra, p. 506;

United States v. Detroit Lumber Company, 200 U. S. 321, 339; United States v. Stinson, 197, U. S. 200, 204."

To the extent that said decision determines that a forfeiture may be declared of petitioners' rights in the real property in question, said decision is in conflict with applicable local decisions, among others, as follows: *Mosso vs. Lee*, 53 Nev. 175; 295 Pac. 776; *Clark vs. London Assur. Cor.*, 44 Nev. 359; 195 Pac. 809; *Lake vs. Lewis*, 16 Nev. 94; *Bishop vs. Stewart*, 13 Nev. 25; *Irvine vs. Hawkins*, 20 Nev. 384; *First Federal Trust Co. vs. First National Bank*, 295 Fed. 353 at 357 (C. C. A. 9, from Nevada); said decision is further in conflict with general equitable principles, see Pomeroy's Equity Jurisprudence (5th Edition), Vol. 2, Section 445, page 301, et seq., and also said decision is in conflict with the Fifth Amendment to the Constitution of the United States of America since to so hold amounts to a deprivation of property without due process of law; see *Walker vs. McCloud*, 204 U. S. 302; and is also in conflict with the decisions of other Circuit Courts of Appeals on the same matter in the following case, among others, *United States Harness Company vs. Graham*, 288 Fed. 929.

In this connection it will be noted that Circuit Judge Healy in his dissenting opinion in the aforesaid case of *United States vs. Garaventa Land and Livestock Company*, supra, states:

> "On these facts it is conceded that as between an ordinary vendor and vendee a forfeiture would not be decreed in equity. Mosso v. Lee, 53 Nev. 176, 295 Pac. 776; Pomeroy's Equity Jurisprudence (5th

Ed.), Vol. 2, §445, p. 301 et seq. The naked circumstance that the United States is the vendor is not an adequate reason for proceeding otherwise.

> "I am not able to see how the denial of the forfeiture in the circumstances here would tend to frustrate the policy of the law. The very purpose of the special act was to make it possible for appellees and others in like situation to acquire title to the lands which they and their predecessors had improved and had so long occupied. Acceptance of the tendered balance with accrued interest in full will make the vendor whole; and it is not claimed that the Government would suffer prejudice in such event because of the default on the basis of which the forfeiture was declared."

In the interest of brevity (Rule 38, par. 2) *Furness, Withy & Co. Ltd. v. Yang-Tsze Ins. Asso. Ltd.*, 242 U. S. 430) petitioners do not at this time set forth all of the points which will be urged upon argument on the merits of this cause should the writ be granted, nor all of the contentions in support of such points.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings of said United States Circuit Court of Appeals for the Ninth Circuit in that certain case numbered on its docket No. 10418, United States of America, Appellant, vs. M. P. Depaoli and Lena Depaoli, his wife, Appellees, and that the judgment herein of the United States Circuit Court of Appeals

for the Ninth Circuit be reversed by this honorable Court and that your petitioners have such other and further relief in the premises as to this honorable Court may seem meet and just.

WILLIAM M. KEARNEY,
Counsel for Petitioners.

SIDNEY W. ROBINSON,
Of Counsel for Petitioners.

The Supreme Court

OF THE

United States

OCTOBER TERM, A. D. 1943

No. .....

M. P. DEPAOLI and LENA DEPAOLI, his wife,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(A) STATUTORY PROVISIONS TO SUSTAIN JURISDICTION

The jurisdiction of the United States Supreme Court is invoked under Section 240(a) of the Judicial Code as amended, 28 U. S. C. A. 347, and under the Act of June 7, 1924, Chapter 311, 43 Stat. 596; 25 U. S. C. A., Section 421 (note), Appendix A.

(B) OPINIONS BELOW

The opinion of the United States District Court for the District of Nevada containing an extensive survey

of the facts involved in the instant proceeding was entered on the 23d day of November, 1942 (R. 223).

The judgment of the United States District Court for the District of Nevada was entered on the 11th day of February, 1943 (R. 247). This case is reported in 47 Fed. Supp. 688.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was entered on the 9th day of December, 1943 (R. 267). This case is reported in 139 Fed. (2nd) 225.

(C) STATEMENT OF FACTS

The essential facts of this case are not in dispute. The action involves the right to possession of certain real property located in Washoe County, Nevada, and was instituted in the District Court of the United States for the District of Nevada on the 4th day of February, 1938 (R. 2).

For approximately seventy-seven years prior to the institution of said action and since the year 1861, the real property in question has been in the exclusive and undivided possession of petitioners and their immediate predecessors in interest who have continuously tilled, cultivated and irrigated the same and broken and cleared the same from uncultivated raw land. During said period of time said petitioners and their immediate predecessors in interest have improved the same and constructed buildings, fences, ditches and dams thereon and used in connection therewith (R. 232).

At the time said real property forming the subject

matter of this action was settled upon, the public surveys had not been extended to include said lands and the same were open and unsurveyed (R. 232). Subsequent to the settlement of said real property there was established what is known as the Pyramid Lake Indian Reservation by executive order of March 23, 1874. The real property in question is included within the exterior boundaries of said Pyramid Lake Indian Reservation, although the Indians for whom said reservation was created have never occupied, used or improved the same and have never been in possession thereof.

On June 7, 1924, the Congress of the United States passed an act entitled "An Act for the Relief of Settlers and Townsite Occupants of Certain Lands in the Pyramid Lake Indian Reservation, Nevada," being Chapter 31, Public Laws of the United States (43 Stat. 596, Chapter 311). A copy of said Act is appended hereto and forms Appendix A. Said Act was passed expressly for the relief of petitioners herein and for the relief of other white settlers similarly situated. Pursuant to the terms and provisions of said Act and on March 3, 1925, M. P. Depaoli, one of the petitioners herein, who is recognized as a qualified applicant under said Act, made petition to purchase the real property involved herein, and in June of said year 1925, said applicant made a quarter-payment upon the total appraised value of said real property, said payment being in the sum of $2,514.82. The application of said petitioner was allowed and said initial quarter-payment was retained. Thereafter, by reason of adverse economic conditions and through no fault of said petitioner

(R. 244), no additional payments were made upon the purchase price of said real property and the General Land Office allowed the matter to remain in status quo although for the period from 1925 until March 10, 1936, various and sundry arrangements for payment were made and negotiations were had regarding the purchase of said property. On March 10, 1936, the General Land Office notified said applicant that the Secretary of the Interior had ruled that all interest due on the unpaid principal was required to be paid within thirty days and that one-third of the remaining principal was required to be paid within six months and that failing said payments the application of petitioner would be cancelled without further notice (R. 240).

Said applicant failed to make said payment of interest and principal pursuant to said last-named ruling of the Secretary of the Interior and on May 13, 1936, said Secretary of the Interior ordered the cancellation of petitioner's application.

Following said date and on August 11, 1936, said petitioner paid the full balance of the purchase price of said real property including interest, said payment being made to the Register of the United States Land Office at Carson City, Nevada. Said final payment, including interest, in the sum of $5,116.62 was forwarded to the United States Land Office in Washington and duly and regularly deposited with the Treasurer of the United States, where the same was retained until April 17, 1939, after the institution of this action, upon which last-named date a tender of said final payment was made to said petitioner which tender was refused by

said petitioner (R. 227, 243). No tender of the initial payment of $2,514.82 has ever been made to petitioner.

Upon the basis of the foregoing facts, the District Court of the United States for the District of Nevada determined that an entry had been made upon the real property in question by said M. P. Depaoli, as a result of which a contract arose as between said M. P. Depaoli and respondent herein, which said contract created the relationship of vendor and vendee as between the parties thereto. Said trial court further determined that said contract, as a valid and subsisting property right, could not be forfeited under the circumstances herein presented by the arbitrary ruling of the Secretary of the Interior, but that the same could only be terminated pursuant to general equitable principles governing suits for cancellation of conveyances and the rescission of contracts (R. 229).

Upon appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the District Court of the United States for the District of Nevada upon the basis of the decision of *United States vs. Garaventa Land and Livestock Company*, 129 Fed. (2nd) 416; (Appendix B), in which said last-named case Circuit Judge Healy dissented. Said decision of said Circuit Court of Appeals in the instant proceeding was written by said Judge Healy (R. 267). It will be noted that said Judge Healy, who had dissented in the case of *United States vs. Garaventa Land and Livestock Company*, stated that he was still of the same opinion as expressed in his dissenting opinion in said case of *United States vs. Garaventa Land and Live-*

stock Company, but that he was bound by the decision of said Circuit Court of Appeals in said case.

(D) SPECIFICATION OF ERRORS

The United States Circuit Court of Appeals for the Ninth Circuit erred in the following particulars, to-wit:

(1) In holding that petitioner acquired no property rights in the property involved by the making of his entry thereon in the manner herein set forth.

(2) In holding that the entry in question did not create a vendor-vendee relationship between respondent and petitioner.

(3) In holding that equitable principles are inapplicable as between respondent and petitioner in connection with the cancellation of petitioner's contract of purchase and the forfeiture of his property rights thereunder.

(4) In holding that the Secretary of the Interior had the authority to arbitrarily declare a forfeiture of petitioner's right in the real property in question under the provisions of the Act of June 7, 1924, Chapter 311, 43 Stat. 596, 25 U. S. C. A., Section 421 (note).

(E) ARGUMENT

It is petitioners' contention that the writ of certiorari should be granted by reason of the aforesaid errors committed by the United States Circuit Court of Appeals for the Ninth Circuit, which said errors have resulted in the destruction of a property right existing in petitioners contrary to the provisions of the Fifth

Amendment to the Constitution of the United States of America since the destruction of said property right has been effected without due process of law.

Since an early date it has been well established by a long line of authorities that when an entry has been made upon real property forming a portion of the public domain, the individual making said entry "acquires an inceptive right to a portion of the unappropriated soil of the country by the filing of his claim ***." See *Chotard vs. Pope*, 12 Wheat. (U. S.) 586.

In the case of *Witherspoon vs. Duncan*, 71 U. S. 210 (4 Wall. 210), this Court in 1867 determined as follows:

> "In no just sense can lands be said to be public lands after they have been entered at the Land Office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the Government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right upon the buyer, and is a void act. According to the well-known mode of proceeding at the Land Offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of which, in due time he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The Government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title."

It will be noted in said last-named case that no distinction was made between a cash and a donation entry.

This Court held in said case that whether the entry be a cash entry or a donation entry, that when the same was made, irrespective of its nature, the particular land in question became "segregated from the mass of public lands, and becomes private property." See also:

Orchard vs. Alexander, 157 U. S. 372, 383;

McMichael vs. Murphy, 197 U. S. 304;

Whitney vs. Taylor, 158 U. S. 85;

Starr vs. Beck, 133 U. S. 541;

The Hastings & Dakota Railroad Company vs. Whitney, 132 U. S. 357;

Denny vs. Dodson, 32 Fed. 899;

McCune vs. Essig, 118 Fed. 273;

U. S. vs. Northern Pacific Railway Company, 204 Fed. 485.

It is petitioners' contention under the authorities hereinabive set forth that when petitioner's application for purchase was filed and accepted and when his initial cash payment was made upon the purchase price of the real property in question, the "entry" upon said real property was completed and that immediately there arose in petitioner a property right in the real property in question which said property right is of a particularly substantial character in view of the fact that the same is coupled with a partial payment. If a property right exists when an entry is made under the General Land Laws regardless of the payment of money, an a fortiori case is presented for the creation of a property right when a partial payment is made concurrently with the making of the "entry" There can be no question but that petitioner herein acquired a property right in the real property involved as soon as

his partial payment had been made upon the purchase price established for said real property. As a result of said application for purchase and its acceptance, and as a result of the partial payment upon the purchase price, a contract arose as between respondent and petitioners creating the relationship of vendor and vendee.

It is well settled that general principles of equity will ordinarily govern in suits instituted by the United States of America to secure the cancellation of a conveyance or the rescission of a contract. To this effect see the following cases:

Pan American Petroleum Company vs. U. S., 273 U. S. 456, 506;

U. S. vs. Detroit Lumber Company, 200 U. S., 321, 339;

United States vs. Stinson, 197 U. S. 200, 204;

Reading Steel Casting Company vs. U. S. 268 U. S. 186.

An exception to the rule that equitable principles will be applied in suits by the United States to secure the cancellation of contracts exists in cases wherein the application of such equitable principles will operate to frustrate the purpose of a law of the United States or to circumvent public policy. See

Pan American Petroleum Company vs. U. S., supra;

Causey vs. U. S., 240 U. S. 399, 402;

Heckman vs. U. S., 224 U. S. 413, 446;

U. S. vs. Trinidad Coal Company, 137 U. S. 160, 170.

It cannot be denied that in the instant proceeding a

contract existed as between respondent and petitioner for the purchase of the real property involved in this proceeding. To determine whether or not said contract may be arbitrarily cancelled in derrogation of all equitable principles, we must first ascertain whether or not the application of equitable principles will frustrate the purpose of a law of the United States or circumvent public policy. Since the proceeding in question is predicated upon an act of Congress, namely, the Act of June 7, 1924, Chapter 311, 43 Stat. 596, 25 U. S. C. A., Section 421 (note), herein referred to, it is petitioners' contention that said Act speaks for itself in determining its purpose and in determining the public policy regarding the matters covered thereby. The Act is entitled "An Act for the Relief of Settlers and Townsite Occupants of Certain Lands in the Pyramid Lake Indian Reservation, Nevada." The purpose of said act is indicated by its title. Said Act has no purpose other than to make it possible for petitioners and other persons similarly situated to acquire title to the real property which they and their predecessors in interest had occupied, cultivated and improved for a period of time extending beyond the creation of the Indian reservation within whose boundaries said real property is situated.

In view of the express purpose of said Act, which is declaratory of the public policy of the United States regarding the situation in question, it is impossible to arrive at any conclusion other than that no purpose of any law of the United States would be frustrated and no public policy would be circumvented by an application of the general principles of equity in connection

with the cancellation of the contract in question. Since no law of the United States is frustrated and since no public policy of the United States is circumvented, the general principles of equity must be applied in determining the rights of the parties under the contract in question in view of the authorities hereinabove referred to.

In connection with the respective equities of the parties hereto, we wish to point out that as late as December 19, 1929, the Commissioner of Indian Affairs addressed a memorandum to the Secretary of the Interior which said memorandum appears in the printed report of hearings before the Committee on Indian Affairs, United States Senate, in the year 1937, in connection with Senate Bill 840. Said memorandum in part reads as follows:

> "The white settlers have only such legal rights as were extended to them by the Act of June 7, 1924, but their equities are unquestioned and in view of all the facts and circumstances of this case, not one of them may be charged with bad faith***. The Indians were not in possession when the white settlements were made, the boundary lines of the reservation were not clearly established, the Government offered no opposition to the settlers, and their claims were bought and sold much in the same manner of privately-owned lands. The new purchasers took possession and no objection appears to have been raised by the Government" (R. 244).

In view of this expression of the Commissioner of Indian Affairs, in view of the fact that petitioners have paid the full amount of the purchase price of the property in question, and in view of the fact that respondent will suffer no prejudice by a specific enforcement of the

contract in question, how can it be said that equitable principles will be best served by permitting the forfeiture of petitioners' property and contract rights and by permitting the forfeiture of their initial payment, no portion of which has been tendered in connection with the cancellation of their contract?

In this connection we refer to the case of *U. S. vs. Budd*, 43 Fed. 630, 144 U. S. 154, wherein the following language is used:

> "In considering the merits of the first of the several grounds for canceling the patent, it is important to keep in mind that this is not like a proceeding to rescind a contract. The government has not offered to return the money it received for the land; and, while it seeks to be restored to its original title and possession, it does not pray to have the parties on both sides placed in the position which they occupied before its officers and agents granted Budd's application to enter the land under this statute, and accepted the money. The case is prosecuted to secure an absolute forfeiture of all the defendants' interests in the land, as well as the money paid for it, and proceeded under the theory that whatever is illegal and wrong in the transaction is chargeable solely to the defendants. Now, if all that is claimed by the government as constituting the first ground for canceling the patent, both as matter of fact and of law, were conceded, the court would be unable to find any such fraud intended, or misconduct on the part of the defendants, as would afford either legal or equitable cause for the confiscation of their property. At most it is only claimed that this particular land, by reason of having been once offered at public sale, is excluded from sale under the Act of June 3, 1878. If this is so, the sale of it to Budd under this statute was an error, but only an error, and one for which the officers and agents of the government are chiefly

responsible; for upon them is cast the duty of administering the law according to its provisions, and of holding all persons seeking to obtain title to lands from the government to a compliance with the laws and regulations prescribed for the determination of their rights. When the government of the United States seeks relief from a court of equity, it is as much bounden as any individual suitor by the rules of equity; it can obtain such relief only when entitled to it upon principles of equity and good conscience. *U. S. vs. White*, 17 Fed. Rep. 273, 8 Sup. Ct. Rep. 850. It cannot, to correct a mere error in a transaction not tainted with crime and fraud, perpetrate so grave a wrong on its part as to deprive its adversary of valuable property or a sum of money without any compensation or equivalent therefor. If this were a suit between two private individuals the plaintiff would not be equitably entitled to a rescission of his contract and restoration of his title to the land without first on his part repaying the purchase money which he had received; and by the same rules of equity and justice the right to the government to recover this land, and also to hold the purchase money paid for it, must be denied, unless a forfeiture of the defendant's rights on the ground of fraud or willful misconduct can be shown."

It is conceded that as between an ordinary vendor and vendee a forfeiture would not be decreed in equity under the circumstances presented by the instant proceeding. To this effect see the following authorities:

Mosso vs. Lee, 53 Nev. 175; 295 Pac. 776;

Clark vs. London Assur. Cor., 44 Nev. 359; 195 Pac. 809;

Lake vs. Lewis, 16 Nev. 94;

Bishop vs. Stewart, 13 Nev. 25;

Irvine vs. Hawkins, 20 Nev. 384;

First Federal Trust Company vs. First National

Bank, 295 Fed. 353 at 357 (C. C. A. 9, from Nev.);

Pomeroy's Equity Jurisprudence (5th Ed.), Vol. 2, Sec. 445, page 301 et seq.

The mere fact that the United States is the vendor is not an adequate reason for refusing to apply equitable principles in connection with the termination of said contract. See *United States Harness Company vs. Graham*, 288 Fed. 929. Failure to apply equitable principles in connection with the cancellation of the contract in question amounts to a deprivation of petitioners' property without due process of law. To this effect see the case of *Walker vs. McLoud*, 204 U. S. 302.

Petitioners further contend that in any event the statute of June 24, 1924, herein referred to does not authorize the Secretary of the Interior to arbitrarily declare a cancellation of the contract in question. In this connection it will be noted that the statute itself makes no provision for the cancellation of an entry duly made. The only power conferred upon the Secretary of the Interior by said statute for the recovery of the possession of any of the real property referred to in said statute is contained in subsection 4 of said statute, which provides as follows:

> "That where an entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of Pyramid Lake Indian Reservation."

It is clear that if an entry was not made within the time provided by said statute, the right of entry and possession immediately arose. However, in all cases

where an entry was made within the time specified, a contract arose, the cancellation of which could not be declared under the provisions of said statute.

No right of possession and no right of entry can be created by rule or regulation contrary to the express provisions of said statute itself. Since the entry of petitioners in the instant proceeding was made within the time specified, said entry gave rise to a valid contract as hereinabove noted. Once said contract came into existence the right to take possession conferred by the statute no longer existed and thenceforth said contract must be dealt with as any other contract creating a vendor-vendee relationship.

While it is true that the Secretary of the Interior promulgated rules and regulations governing the purchase of the real property in question, none of said rules or regulations provided for a forfeiture or any method for the termination of contracts created under said statute. If it be said that a forfeiture may be declared in the absence of any express provision therefor, then it may with equal force be said that the Secretary of the Interior to satisfy any passing whim might from time to time promulgate rules or regulations the effect of which would utterly destroy the very purpose of the Act and thereby frustrate the legislative intent of Congress, whose sole purpose was to provide aid and relief for petitioners and other persons similarly situated. Any rules and regulations adopted under said Act must be authorized by the Act itself and any rules or regulations purporting to assume or take power in excess of the statute are void. See

Morrill vs. Jones, 106 U. S. 466;
Campbell vs. U. S., 107 U. S. 407;
Williamson vs. U. S., 207 U. S. 425;
Meads vs. U. S., 81 Fed. 684;
United States vs. George, 228 U. S. 14.

In the case of *Michigan Land and Lumber Company vs. Rust*, 168 U. S. 589, this court states as follows:

> "It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title."

It will not be denied that redress can always be had in courts when the officers of the Land Department have withheld from a pre-emptioner his rights, when they have misconstrued the law, or when any fraud or deception was practiced which affected their decision. See *Halley vs. Diller*, 178 U. S. 476, 490; *Sanford vs. Sanford*, 139 U. S. 642, 647.

If the decision of the United States Circuit Court of Appeals is permitted to remain unreversed, the ranching unit built around the real property in question will be completely destroyed, resulting in a situation wherein petitioners will own and occupy alternate legal subdivisions with the real property in question, in a more or less "checkerboard" fashion. This situation will prevent the practical and economical use of any of the real property by either petitioners or by the Indians, for whose benefit the Pyramid Lake Indian Reservation was created.

As heretofore indicated, the dams and ditches were constructed for the purpose of irrigating the ranching

unit involved as a single operating property. The removal of the real property involved in the instant proceeding will destroy the entire irrigation system and the usefulness thereof, insofar as both parties are concerned, thereby making it impractical without the expenditure of large sums of money to irrigate not only petitioners' patented property, but also the real property involved in this suit in the event the same should be held to belong to respondent.

The use has already been recognized in petitioners to use the water upon all of the land involved in the unit, in the case entitled "The United States of America vs. Orr Water Ditch Company, et al, In Equity, Docket A-3, United States District Court for the District of Nevada" (Unreported) (R. 241).

In conclusion, therefore, petitioners respectfully urge that the decision and decree to which the petition for Writ of Certiorari is directed is contrary to and in conflict with prior decisions of this court, that the same is contrary to and in conflict with prior decisions of other Circuit Courts of Appeal, that the same is contrary to and in conflict with generally established principles of equity and that the same is erroneous and subject to reversal.

Dated: Reno, Nevada, February....., 1944.

WILLIAM M. KEARNEY,
Counsel for Petitioners.

SIDNEY W. ROBINSON,
Of Counsel for Petitioners.

(Appendix Follows)

Appendix A

ACT OF JUNE 7, 1924

That the Secretary of the Interior is hereby authorized to sell to settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands in the Pyramid Lake Indian Reservation, in the State of Nevada, that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act: Provided, that no more than six hundred and forty acres shall be sold to any one person or corporation: Provided further, That said sales shall be by private cash entry after it has been shown to the satisfaction of the Secretary of the Interior that the lands applied for have been settled upon, occupied, and improved as required by this Act, and in addition to such price per acre as may be fixed by the Secretary of the Interior all entrymen hereunder shall pay the same fees and commissions as provided by law where public lands are disposed of at $1.25 per acre. The proceeds of said sales shall be deposited in the Treasury of the United States and be subject to appropriations by Congress for the Piute Indians of the said Pyramid Lake Indian Reservation.

2. That the Secretary of the Interior is also authorized to have a survey and plate made of the town of Wadsworth, in said Pyramid Lake Indian Reservation, and thereafter sell the unpatented lands embraced in the said town as provided for by section 2384 of the

Revised Statutes of the United States, and on compliance with said statute the purchasers of the lots shall acquire title as provided for by the said statute: Provided, That any lands within the limits of said town used for Indian school purposes or for other public use for Indians shall be, and the same are hereby, reserved from said town site, and the Secertary of the Interior, upon payment to him of the sum of $100, is hereby authorized to convey by patent to the board of county commissioners of Washoe County, Nevada, or other proper school officials of the town of Wadsworth, Nevada, the lands now known as lots thirty-eight to forty-seven, inclusive, of block two in said town of Wadsworth, as surveyed in 1898 by T. K. Stewart: Provided further, That if there are any Indians residing in said town and in possession of and claiming any lots therein they shall have the same rights of purchase under the said statute as white citizens. The proceeds of the sale of lands in said town shall also be deposited in the Treasury of the United States and be used by the Secretary of the Interior for the Piute Indians of the Pyramid Lake Indian Reservation, and the proceeds derived from the sale of lands under section 1 of this Act are hereby made available for use by the Secretary of the Interior in making such surveys or resurveys within the said town site of Wadsworth as may be necessary to carry out the provisions of this Act.

3. That titles to lands in said Pyramid Lake Indian Reservation acquired by patents heretofore issued by the United States to any Railroad Company, individual,

or the State of Nevada, or by certification to the State of Nevada, are hereby confirmed.

4. All sales in accordance with section 1 of this Act shall be made through the local land office within ninety days after the price of the land shall have been fixed by the Secretary of the Interior: Provided, That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation.

Appendix B

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*, vs. GARAVENTA LAND AND LIVESTOCK CO., a corporation, JOE GARAVENTA, LOUISE GARAVENTA, his wife, FRANK GARAVENTA and WILLIAM GARAVENTA, *Appellees.*	No. 9950 Jul. 6, 1942

Upon Appeal from the District Court of the United States for the District of Nevada

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Before:

MATHEWS, HANEY and HEALY, Circuit Judges.
HANEY, Circuit Judge.

The United States has appealed from an adverse judgment in an action brought by it to recover possession of certain lands.

In 1861, the lands in question were settled upon and occupied by the predecessors in interest of appellee. The boundaries of Pyramid Lake Indian Reservation, established by an executive order of March 23, 1874, included the lands in question, but they have never been occupied, since settled upon by appellee's predecessors, by any of the Indians for whom the reservation was established.

The Act of June 7, 1924, Ch. 311, 43 Stat. 596, was an act entitled "An Act for the Relief of Settlers and

Townsite Occupants of certain lands in the Pyramid Lake Indian Reservation, Nevada." Section 1 of that act authorized the Secretary of the Interior

> "* * * to sell to settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands in the Pyramid Lake Indian Reservation, in the State of Nevada, that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act * * * *Provided further*, That said sales shall be by private cash entry * * *."

Section 4 provided:

> "All sales in accordance with section 1 of this Act shall be made through the local land office within ninety days after the price of the land shall have been fixed by the Secretary of the Interior: *Provided*, That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Pinte Indians of the Pyramid Lake Indian Reservation."

The act contained no provision for repossession of the lands by the United States in the event of default in payment of part of the purchase price. It contained no provision expressly authorizing installment payments on the purchase price.

On March 3, 1925, the price of appellee's land was fixed by the Secretary of the Interior. The amount required to be paid by appellee was $7,395.70. At the same time, the Secretary stated that the "claimants of the lands listed will be allowed 90 days from February 7, 1925 * * * within which to pay the appraised price of the

land ***." On May 1, 1925, the Secertary, by telegram, authorized the claimants to either pay cash in full or one-fourth down and the balance in three equal installments with interest on the deferred payments at the rate of 5% per annum.

Appellee made application to purchase the lands in question on May 7, 1925, and paid $1,853.92, its application stating:

> "The prices to be paid for the said land are governed by the notice of March 3, 1925 and Local Land Office notice dated May 1, 1925, under the same heading, or in the event any changes are made in the ruling of March 3, 1925 reducing the prices to be paid for the said land or the terms of payment the undersigned desires and requests the benefit thereof."

The application was allowed on September 16, 1925, but no further sum has been paid by appellee on the purchase price.

On September 26, 1931, the register of the proper land office was directed to notify appellee that it was allowed 90 days from receipt of notice within which to pay the balance of $5,541.78 principal with interest "or to appeal to the Secretary of the Interior failing in which the purchase, which is hereby held for cancellation will be finally canceled without further notice." Prior to the expiration of the 90 days, the decision was revoked and the register was directed to notify appellee that an extension of 30 days' time had been granted it to pay "one-third of the deferred payments, together with one-third of the accrued interest, the balance to be paid in two equal installments, with interest, in one and

two years from the extension period." The register was further directed to notify appellee "that if the first amount is not paid on or before January 31, 1932, or an appeal filed the purchase, which is hereby held for cancellation will be cancelled, the money heretofore paid forfeited and the case closed without further notice."

On April 12, 1935, the register was directed to notify appellee that the purchase price of the land was reduced to $4,005.70, and the interest rate reduced to 4%, that appellee would be allowed 30 days from receipt of notice to pay the balance owing or the interest to December 31, 1934, only, and that unless either of such payments were made, or an appeal was taken to the Secretary of the Interior, appellee's entry would be canceled, its payment forfeited and the case closed without further notice. Appellee appealed to the Secretary of Interior on July 15, 1935, who held on November 25, 1935, that all interest due must be paid within 30 days after notice, that one-third of the unpaid principal now outstanding must be paid by August 27, 1936; that the unpaid principal would be computed on the basis of the reduced price above mentioned; and that interest would be computed from the date of default. Accordingly, the register was directed to notify appellee that $701.09 interest due as of March 31, 1936, must be paid within 30 days after notice, and if not so paid, the entry would be canceled without further notice.

Appellee made no response to any of the notices, and on May 13, 1936, the Commissioner of the General Land Office wrote the register that appellee's entry was thereby canceled. Notice of cancellation was given appellee,

and on June 2, 1936, appellee was notified to vacate the lands in question on or before September 30, 1936.

Appellee failed to comply with the notice, and this action was filed on February 4, 1938. The complaint alleged that appellant, at all times since 1848, has been the owner and entitled to possession of the lands in question; that appellee's application to purchase such lands, pursuant to the Act of June 7, 1924, was accepted, but that appellee failed to make the required payments; and that appellee's entry had been canceled, and possession of the lands demanded on behalf of the proper tribe of Indians. Recovery of possession of the lands in question and for the issuance of all necessary writs to accomplish such object, were prayed for.

The answer contained denials and two affirmative defenses. In the first affirmative defense, appellee alleged that the lands had been occupied by it and its predecessors for more than 70 years, had been extensively improved, and by reason thereof it would be unjust and unconscionable to eject appellee from the premises. The second affirmative defense alleged that appellee had tendered payment of the purchase price which had been refused and that at all times it had kept the tender good and did then offer to pay the purchase price in full.

The trial court found that tender of the purchase price by appellee was not made until after it had received notice of cancellation of its entry. It found other facts unnecessary to relate, and concluded "that it would be inequitable and unjust to require or permit the cancellation of such contract of sale or to disturb [ap-

pellee's] possession of said lands." Dismissal of the complaint followed, and the United States appealed.

Appellee argues that the act of June 7, 1924, did not authorize cancellation of any entry made thereunder, and the power to cancel cannot be implied from the act; that upon making the first payment, appellee acquired an equitable title; and that the contract of sale must be treated the same as any contract of sale between private parties, the implication being that appellee's rights could be terminated only by a proper proceeding in court.

We believe these contentions cannot prevail. The Act of June 7, 1924, authorized the Secretary of the Interior to sell the lands in question "under such terms, conditions, and price per acre as the said Secretary may prescribe." Thus Congress authorized the Secretary of the Interior to fix the time for payment and to impose the condition which would obtain on default by appellee. The Secretary fixed the price, the time of payment and the result obtaining upon default by appellee, and in doing so exercised the authority granted by the statute. As in other cases, appellee could acquire a title sufficient to prevail over appellant here only upon payment of the purchase price. Frisbie v. Whitney, 76 U. S. (9 Wall.) 187, 194. Until that event occurs, and as against appellant, appellee does not have the right of possession.

Considerable argument is made to the effect that by reason of long occupancy of the lands in question by appellee and its predecessors, extensive improvement thereof, part payment therefor, and the obvious pur-

pose of Congress to permit the settler or his successor to obtain title to the lands, appellee has acquired an equitable interest in the lands. While these considerations might be important as between appellee and third persons, they have little weight in this controversy between appellee and appellant. See: Utah Power & Light Co. v. United States, 243 U. S. 389, 409.

The settler knew or should have known, when settlement and improvement was made, that he could acquire title to the lands as against appellant, only by legislative grace. Any improvement of the lands after reservation by appellant, was made at the settler's risk. With respect to the part payment, and the indicated purpose of Congress to enable the settler to acquire the lands, it must be pointed out that appellee has had nearly seventeen years to fulfill the conditions required of him. Rather than to meet those conditions, appellee has consistently tried to have the price reduced and the time extended. If appellant had any duty with respect to liberality toward the settlers, the duty has been fulfilled by nearly seventeen years of indulgence.

When appellee made its part payment, it knew that the Secretary had not then fixed the terms and conditions controlling on its default. It would appear to be a reasonable rule that the Secretary might thereafter fix, as he did fix, such terms and conditions. Certainly it seems unreasonable to say that because the Secretary did not fix such terms and conditions at one time, he is forever barred from performing the duty required of him by statute. However, that may be, the Secretary did fix a reduced price, the benefit of which is here claimed

by appellee, and prescribed the applicable conditions upon default by appellee. Appellee will not be heard to say that it can insist on one condition, i.e. the reduced price, but can reject all others.

We hold that appellee has failed to show a right of possession superior to that of appellant.

The Judgment is reversed and the cause is remanded to the court below with instructions to enter the judgment prayed for by appellant.

HEALY, C. J., Dissenting

The special act passed for the relief of this small group of settlers is evidence of the Congressional belief that there were substantial equities in their situation.

Pursuant to the Act the Secretary, in 1925, prescribed the terms of sale and accepted appellee's application to purchase the land they occupied, together with their down payment of $1,853 on the total price of $7,395. Afterwards there were a number of extensions, and the purchase price was reduced to $4,005. In the period of 11 years following the original purchase numerous defaults occurred of which no advantage was taken. The land became subject to a mortgage, and appellees had tried unsuccessfully to raise the balance owing. Subsequent to the Secretary's notice of forfeiture in 1936, it appears that appellees were able to secure from their mortgagee the sum necessary to complete the payment, and they thereupon made a tender of the balance with the accrued interest. This tender has been kept good. In their answer to the complaint of the Government,

appellees alleged the making of the tender and its refusal and stated their readiness and ability to pay the balance in full.

On these facts it is conceded that as between an ordinary vendor and vendee a forfeiture would not be decreed in equity. Mosso v. Lee, 53 Nev. 176, 295 Pac. 776; Pomeroy's Equity Jurisprudence (5th ed.), Vol. 2, §445, p. 301 et seq. The naked circumstance that the United States is the vendor is not an adequate reason for proceeding otherwise.

Equitable principles will not, of course, be applied to frustrate the purpose of a law of the United States or to circumvent public policy. Pan American Company v. United States, 273 U. S. 456, 506; Causey v. United States, 240 U. S. 399, 402; Heckman v. United States, 224 U. S. 413, 446; United States v. Trinidad Coal Company, 137 U. S. 160, 170. But it is well settled that general principles of equity will ordinarily govern in suits by the United States to secure the cancellation of a conveyance or the rescission of a contract. Pan American Company v. United States, supra, p. 506; United States v. Detroit Lumber Company, 201 U. S. 321, 339; United States v. Stinson, 197 U. S. 200, 204.

I am not able to see how the denial of the forfeiture in the circumstances here would tend to frustrate the policy of the law. The very purpose of the special act was to make it possible for appellees and others in like situation to acquire title to the lands which they and their predecessors had improved and had so long occupied. Acceptance of the tendered balance with accrued

interest in full will make the vendor whole; and it is not claimed that the Government would suffer prejudice in such event because of the default on the basis of which the forfeiture was declared.

The case should be returned to the trial court with directions to enter judgment for the Government unless the balance of the principal with accrued interest be paid within thirty days. In the event of such payment the dismissal should stand.

(Endorsed:) Opinion and dissenting opinion. Filed Jul. 6, 1942. Paul P. O'Brien, Clerk.

No. 743

In the Supreme Court of the United States

OCTOBER TERM, 1948

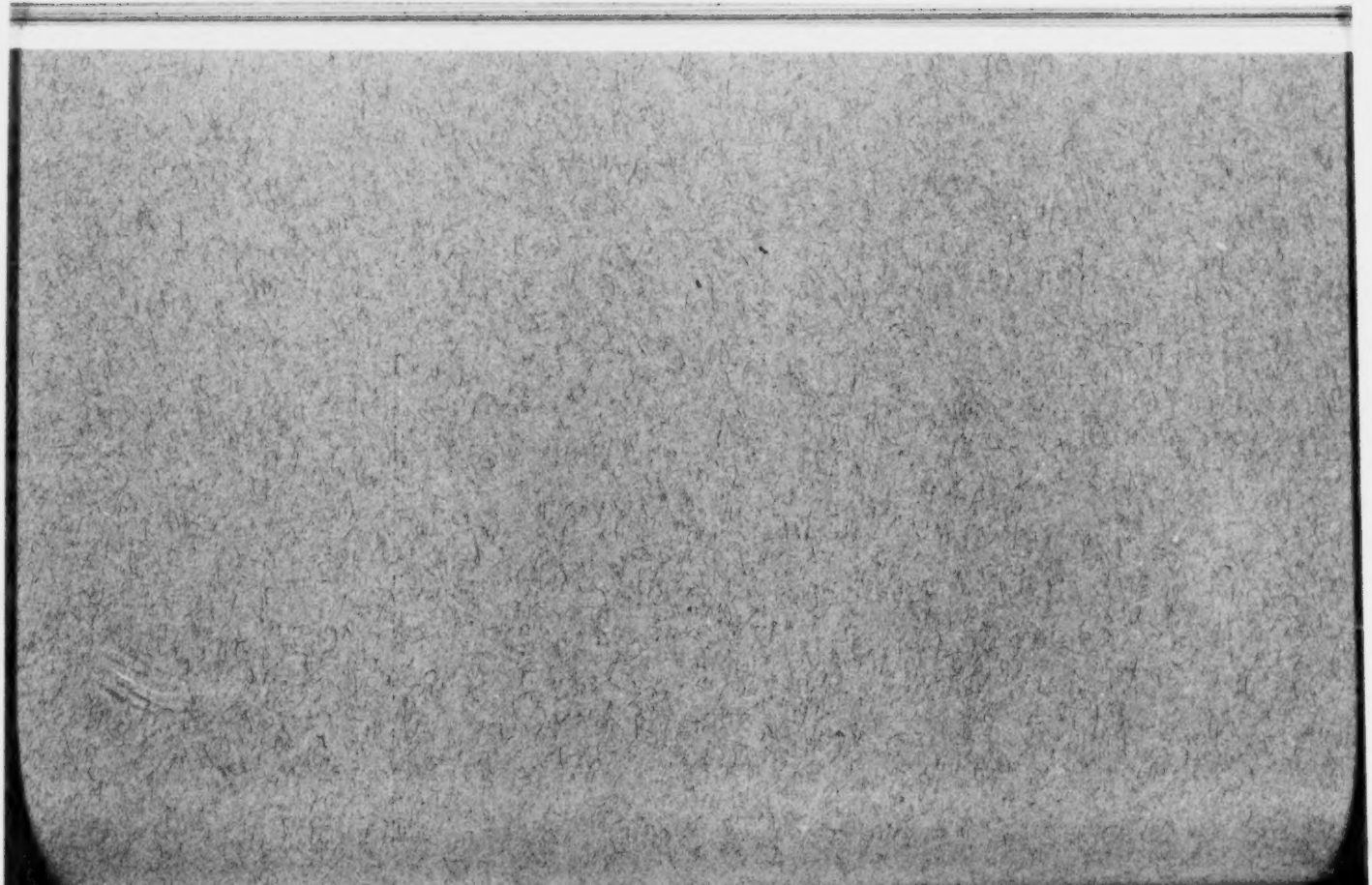
M. P. DEFEO AND LENA DEFEO, HIS WIFE,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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CITATIONS

579087—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

M. P. DEPAOLI AND LENA DEPAOLI, HIS WIFE,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 223–230) is reported in 47 F. Supp. 688. The opinion of the circuit court of appeals (R. 267–270) is reported in 139 F. 2d 225.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered December 9, 1943 (R. 271). The petition for a writ of certiorari was filed February 29, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the applicable legislation and the facts of the case, the Secretary of the Interior lawfully cancelled for default in payment of deferred instalments of the purchase price petitioner's application to purchase lands within the Pyramid Lake Indian Reservation in Nevada.

STATUTE INVOLVED

The material portion of the Act of June 7, 1924, 43 Stat. 596, follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior is hereby authorized to sell to settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands in the Pyramid Lake Indian Reservation, in the State of Nevada, that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act: *Provided,* That no more than six hundred and forty acres shall be sold to any one person or corporation: *Provided further,* That said sales shall be by private cash entry after it has been shown to the satisfaction of the Secretary of the Interior that the lands applied for have been settled upon, occupied, and improved as required by this Act, and in addition to such price per acre as may be fixed by the Secretary of the Interior all entrymen hereunder shall

pay the same fees and commissions as provided by law where public lands are disposed of at $1.25 per acre. The proceeds of said sales shall be deposited in the Treasury of the United States and be subject to appropriations by Congress for the Piute Indians of the said Pyramid Lake Indian Reservation.

* * * * *

SEC. 4. All sales in accordance with section 1 of this Act shall be made through the local land office within ninety days after the price of the land shall have been fixed by the Secretary of the Interior: *Provided,* That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation.

STATEMENT

The Pyramid Lake Indian Reservation was established by formal action of the Department of the Interior in 1859.[1] In 1861 some of the lands

[1] The district court found that the reservation was established in 1874 (R. 236). The difference in dates is immaterial. The Executive Order of March 23, 1874, referred to in the opinion of the trial court (R. 236) merely gave formal sanction to an accomplished fact and was not necessary to the establishment of the reservation. See *United States* v. *Walker River Irr. District*, 104 F. (2d) 334 (C. C. A. 9), at pp. 338–339:

"The Walker River reservation as originally defined was surveyed within a few years, and in 1874 President Grant issued an executive order setting the lands apart for the Pahute and other Indians residing thereon. The action

included within the boundaries of the reservation were occupied by white men. Although they had no title to the lands, these men or their successors continued in occupancy thereof (R. 232). By the Act of June 7, 1924, *supra,* Congress made provision that they or their successors might purchase the lands they occupied "under such terms, conditions, and price per acre" as the Secretary of the Interior might prescribe.

Pursuant to this legislation the Secretary in March of 1925 promulgated regulations directing that the settlers be allowed ninety days from February 7, 1925, within which to purchase the land and pay the appraised price therefor (R. 37–56, 238). In the following May he modified these regulations to permit the settlers to pay the purchase price in instalments—one-fourth down and the balance in three equal annual payments with interest at five percent per annum (R. 238). Twelve of the settlers applied to purchase lands

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taken in November, 1859 initiated the establishment of the Walker River Indian Reservation. The acts of the heads of departments are the acts of the executive. *Wilcox* v. *Jackson*, 13 Pet. 498, 513, 10 L. Ed. 264; *Wolsey* v. *Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915. The subsequent proclamation of the President merely gave formal sanction to an accomplished fact. *Northern Pac. Ry. Co.* v. *Wismer*, 246 U. S. 283, 38 S. Ct. 240, 62 L. Ed. 716; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 385, 389, 390, 22 S. Ct. 650, 46 L. Ed. 954. That this was true of the Pyramid Lake reservation, created at the same time and in the same manner as that on the Walker River, was formally determined by the Department of the Interior in *Central Pacific Ry. Co.*, 45 L. D. 502."

and made the down payment, and seven of these ultimately completed their payments and received patents (R. 238).

The remaining five settlers defaulted in the making of their deferred payments (R. 85–86). No action was taken prior to 1931 with respect to their applications because of existing economic conditions and the pendency of proposed legislation to reduce the purchase price (R. 239). In September of 1931 the settlers were given ninety days within which to pay the full deferred balance and interest, but in December of 1931, before the expiration of the ninety days, the order was modified and they were allowed until January 31, 1932, to pay one-third of the balance and interest (R. 239). At the same time they were advised that, in the case of default and in the absence of an appeal to the Secretary of the Interior, their applications would be cancelled, all moneys theretofore paid would be forfeited, and the cases closed (R. 239). The settlers again defaulted, but no action was taken on their applications pending consideration of a Senate resolution which required the Department of the Interior to withhold further collections from the settlers until a Senate committee could investigate regarding the existing appraisals (R. 239).

In May of 1935 the settlers were granted a reduction in the purchase prices and the rate of interest and were allowed thirty days within which to pay the principal and interest in full or to pay

the interest only (R. 240). Again they were warned that their applications would be cancelled and all moneys forfeited unless proper payment was made or an appeal taken to the Secretary (R. 67–68, 240). The settlers appealed for a further reduction of the purchase price (R. 240). In March of 1936 they were notified that the Secretary required that the interest due should be paid within thirty days; that one-third of the unpaid principal should be paid within six months; and that if they failed in this, their applications would be cancelled without further notice (R. 240). No right of appeal from this final decision was granted. The settlers failed to pay the interest as required, and in May of 1936 the Secretary ordered their applications cancelled (R. 240). Notice of cancellation was given to them (R. 173, 242), and in June of 1936 they were requested to vacate the lands by September of that year (R. 149–150).

The defaulting applicants failed to remove from the lands as required, and in February of 1938 the United States filed separate eviction actions against them (R. 23–24).[2] In these actions the settlers defended on the ground that, under the Act of June 7, 1924, *supra*, the Secretary of the

[2] The filing of these suits was delayed until it became apparent that S. 840, 75th Congress, a bill to authorize the Secretary to issue patents to the settlers upon payment of the full balance of the purchase price and which had passed the Senate, would not be submitted to a vote in the House.

Interior had no authority to cancel their applications. In four of the cases the defendants alleged willingness to make full payment. In the fifth, which is the one here involved, the defendant alleged that he had tendered and the United States had accepted full payment (R. 28–36). The district court held four of the cases in abeyance and entered judgment of dismissal in the other, holding that the Secretary could not cancel the application because the 1924 Act gave him no express power to do so and cancellation of defendant's application and disturbance of his possession would be unjust and inequitable. *United States* v. *Garaventa Land and Livestock Co.*, 38 F. Supp. 191 (D. C. Nev.)

The circuit court of appeals reversed the *Garaventa* case. It held that, under the Act of June 7, 1924, *supra*, the Secretary could permit the settlers to make payment in instalments and could impose the condition that if deferred instalments were not paid on time the down payments and the settlers' right should be forfeited; that the settlers in default would not be heard to claim the benefit of making payments in instalments but to disavow the burdens; and that principles of equity could not be applied so as to defeat the Secretary's power of cancellation under the statute. The court added that if the United States had any duty of liberality toward the settlers, "the duty has been fulfilled by nearly seventeen years of indulgence." 129 F. 2d 416.

The district court thereafter entered judgment in favor of the United States in all the cases except the present one against the Depaolis (R. 224). Facts specially pertaining to this case had been developed at the trial, as follows: on August 14, 1936, three months after the Secretary had cancelled his application, Mr. Depaoli had filed with the Register of the United States Land Office at Carson City, Nevada, a petition for reinstatement thereof, accompanied with a deposit of the full amount of unpaid principal and interest (R. 103–106). On September 30, 1936, the Secretary rejected the petition and simultaneously ordered the return of the amount deposited with the application (R. 100–102). As indicated in the Secretary's letter of rejection, upon cancellation of petitioner's application in May of 1936 the land covered thereby had reverted to Indian ownership and the Secretary was therefore without legal power to grant the petition for reinstatement or to accept the tender of payment. Under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) and the constitution adopted thereunder by the Pyramid Lake Paiute Tribe the Tribal Council was vested with full authority to veto any sale of tribal lands (R. 101). However, notwithstanding the rejection, the deposit, through error, was not actually returned until April of 1939, when Depaoli received a Government check,

which he returned to the Federal Reserve Bank at San Francisco (R. 243, 268)[3]

On these facts, the district court concluded that the instant case was analogous to a transaction between an ordinary vendor and vendee and, applying principles of equity, held that, even though the cancellation of the application was valid when made, it had subsequently been rendered ineffectual by the delay of more than two and one-half years before actual return of the amount deposited with the petition for reinstatement, particularly in view of Depaoli's claim that because of the depression he was unable to pay the full purchase price prior to the cancellation (R. 229–230).

Judgment was thereafter entered for the defendants (R. 223). The circuit court of appeals

[3] The record does not explain the delay, but the circuit court of appeals was advised of the following facts: The certificate covering Depaoli's deposit had been erroneously endorsed "Pyramid Lake Lands" by the Register of the local land office, and the deposit had been covered into the Treasury in August of 1936 as "Piute Indian Lands—Pyramid Lake Reservation, Nevada," where it was not subject to return until correction of the error. Correction was made in July of 1937, and the deposit placed in a special receipt account, "Deposits, Unearned Proceeds, Lands, etc., General Land Office, Carson City, Nevada." Through inadvertence no further action was taken toward returning the money until Depaoli's defense of full payment was called to the attention of the Department of the Interior and an investigation made, which resulted in the Register's being requested to prepare a refund voucher in March of 1939.

reversed, holding on authority of the *Garaventa* case that the Secretary's rejection of the petition for reinstatement was of equal authority and finality with his cancellation of the application, and that the delay in the return of the deposit did not work an estoppel against the United States (R. 269–270).[4]

[4] S. 24, a bill which would authorize the Secretary of the Interior to issue patents to the five defaulting settlers upon payment of the full balance of the purchase price, passed the Senate. The House Committee on Indian Affairs recommended passage, but following extensive hearings voted to rescind its prior favorable action, and no further action has been taken. Similar bills had been introduced in the 75th, 76th and 77th Congresses, had passed the Senate, but failed of being submitted to a vote in the House. S. Rep. No. 80, 78th Cong., 1st sess. (1943), p. 1.

The Department of the Interior has opposed enactment of these measures on the grounds: (1) that the right of the Pyramid Lake Paiute Tribe to possession of these lands is prior and superior, morally and legally, to that of the non-Indian settlers; (2) that the land having been confirmed in Indian ownership in 1936, after failure of certain settlers to meet the terms offered, action divesting the Indians of such ownership would be inconsistent with pledges of the Federal Government embodied in the Act of June 18, 1934 (48 Stat. 984) and in the tribal constitution and corporate charter issued thereunder; (3) that if the settlers have any equitable claims they are based upon the encouragement given them through the laxness of the Government in protecting Indian lands against trespass, rather than upon any acts or omissions of the Indians, and such equitable claims should therefore be settled between the settlers and the Government, preferably by a relief bill for the payment of damages, rather than by depriving the Indians of their lands.

ARGUMENT

The Act of June 7, 1924, empowered the Secretary to fix the price and the terms and conditions for the sale of the land. Hence, he could authorize payment in instalments and could impose the condition of forfeiture for default in the deferred payments. Cf. *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 309; *Cameron* v. *United States*, 252 U. S. 450, 459–463. Since petitioners did not make payment within the time he prescribed, they acquired no right in the land. Therefore, they may not properly seek the protection of equity for a right which they do not have. Cf. *Yosemite Valley Case*, 15 Wall. 77, 87; *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260, 269. Nor may they rightfully invoke equitable principles to invalidate the Secretary's cancellation of their application to purchase the land, for otherwise the plain policy of the statute, which was to sell the land but only upon compliance with terms and conditions fixed by the Secretary of the Interior, would be thwarted. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409. Further, petitioners ought not to be heard to complain of the Secretary's act in canceling their application and forfeiting their initial payment when that was the condition of the privilege which they accepted of making payment in instalments and at a reduced price. Accordingly, the Secretary properly rejected their petition for reinstatement, inasmuch

as he acted within his authority in canceling their entry and intended the cancellation to be final (R. 101–102). The delay in the return of the deposit which accompanied the petition for reinstatement is wholly immaterial because, the delay having resulted from the errors of subordinate employees, it cannot prejudice the rights of the United States. *Wilber National Bank* v. *United States*, 294 U. S. 120, 123–124 (1935).

If the circuit court of appeals was wrong in stating in the *Garaventa* case (see (Pet. 41) that "any duty with respect to liberality toward the settlers * * * has been fulfilled by nearly seventeen years of indulgence," any remaining equities of petitioners should be considered by the Congress, which alone has power to make relief appropriations if it considers such action appropriate.

CONCLUSION

The decision below involves no conflict and is correct. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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